Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Digital Output Protection	)	
Technology And Recording	)	MB Docket No. 04-64
Method Certifications:	)	
	)	
Digital Transmission Content	)	
Protection (DTCP)	)	

To: Media Bureau

COMMENTS OF HEWLETT-PACKARD COMPANY

Hewlett-Packard Company ("HP") submits these comments on the Digital Transmission Content Protection ("DTCP") broadcast flag certification submitted by Digital Transmission Licensing Administrator LLC for digital output protection technology to be jointly licensed by a group of consumer electronics and information technology companies (the "5C Companies").[1] HP limits its comments to certain licensing terms of the DTCP technology pertaining to intellectual property and competitive matters that have no bearing on content protection or the operation of the DTCP technology. HP believes that several provisions in the license covering the DTCP technology do not satisfy the Commission's requirement that the technology be licensed on a reasonable and non-discriminatory basis.

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[1] *See* Certification of Digital Transmission Licensing Administrator LLC for Approval of DTCP as an Authorized Output Protection Technology, MB Docket No. 04-64 (Mar. 1, 2004) ("*DTCP Certification*"). The 5C Companies are Hitachi, Intel, Matsushita, Sony, and Toshiba.

While the Commission should refrain from intervening in private licensing agreements in a free and open marketplace, by virtue of the Commission's adoption of the broadcast flag regulation, there is no longer a free and open marketplace for content protection technologies for DTV devices. DTV devices will be required to be shipped equipped with approved content protection technologies and, therefore, the license terms of these approved technologies are effectively part of the Commission's regulation. With respect to the licensing terms of the DTCP technology, there are several elements of those licensing terms that warrant Commission scrutiny.

HP's concern regarding these elements is compounded by the fact that no other proposed technology is readily substituted for the DTCP technology for sending encrypted compressed content between DTV devices and related equipment. Commission scrutiny of license terms would not be necessary if numerous, substitutable technologies had been available in order to achieve compliance with the regulation, but this is not the case with the DTCP technology.

Moreover, the DTCP technology has a head start in the marketplace because of the approval of DTCP for MOST connections and its pending consideration for USB and 1394 connections in the license for DVD players. DTCP for 1394 connections also is explicitly identified as one of two approved output technologies in the DFAST license which was mandated as part of the Commission's cable "Plug & Play" rulemaking.[2] This head start is of particular concern in the context of interconnected information technology and consumer electronics devices where network effects enable the first mover to obtain

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[2] *See In re Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, CS Docket No. 97-80; PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking, FCC 03-225 (rel. Oct. 9, 2003).

monopoly power and create formidable barriers to the emergence of competing technologies.

Given these advantages of DTCP, an evaluation of the license terms of the technology is necessary and appropriate. As the Commission recognized in the broadcast flag proceeding: "[W]e are concerned with one industry segment exercising a significant degree of control over decisions regarding the approval and use of content protection and recording technologies in DTV-related equipment."[3] Indeed as part of the interim procedure established for the submission of broadcast flag technologies for approval, the Commission required each proponent to submit "a copy of its licensing terms and fees, as well as evidence demonstrating that the technology will be licensed on a reasonable, non-discriminatory basis."[4]

HP believes that several provisions in the license covering the DTCP technology do not satisfy the Commission's requirement that the technology be licensed on a reasonable and non-discriminatory basis. In particular, HP is concerned that the DTCP licensing terms are anticompetitive, and approval of the technology with these license terms could impede both competition and innovation in the marketplace for DTV devices and associated content protection technologies.

HP's primary concern with the DTCP license terms is the unduly broad intellectual property nonassert provision.[5] HP invests approximately $4 billion annually in research and development, and the company is routinely one of the

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[3] *In re Digital Broadcast Content Protection*, Report and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23550, ¶ 52 (2003).
[4] *Id*. at ¶ 53; *see also* 47 C.F.R. § 73.9008(a)(4).
[5] *See DTCP Certification* at Appendix 2 (Proposed Adopter Agreement), Clauses 5.3, 5.4 and 5.5. These nonassert clauses apply not only to the patents and patent applications (through the definition of "Necessary Claims"), but to copyrights and trade secrets as well.

top patent recipients in the country. HP's intellectual property is the very core of its business, and it cannot lightly accept a requirement that places a potentially large portion of its intellectual property rights in jeopardy.

Specifically, with only narrow limitations, the DTCP license terms require licensees to relinquish to the 5C Companies and all other licensees any and all of their intellectual property rights that may relate to the DTCP technology.[6] This provision is particularly onerous when viewed in the context of the other features of the DTCP license. For example, the essential patents relating to the DTCP technology have not been disclosed to prospective licensees, so the reach of this intellectual property nonassert provision is not known. Similarly, licensors can make changes to the specifications or to compliance rules in the future,[7] and therefore the scope of the intellectual property nonassertion constraints could expand over time.

In ordinary circumstances, HP could choose not to sign this license, but the existence of the broadcast flag regulation (and the cable Plug & Play regulation) – coupled with the fact that other proposed technologies are not ready substitutes for the DTCP technology – significantly limits HP's choice in this regard. Given these circumstances, imposition of broad intellectual property nonassert provisions of the kind here in question deprives HP and other licensees of any return on their own intellectual property investments, diminishes their incentives to innovate on a going-forward basis, and thereby diminishes competition and innovation generally. For these reasons, HP does not believe that the intellectual property nonassert provision satisfies the Commission's requirement that the DTCP technology be licensed on a reasonable and non-discriminatory basis.

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[6] *See id*.

[7] *See id*. at Clause 3.3.

In addition, HP is concerned about other provisions of the DTCP license, and the absence of certain license terms, including the following:

- Changes to the license rules – The founding licensors have the ability to change the compliance rules over time in ways that can competitively disadvantage licensees that are the founders' direct product rivals. These changes could favor the products of some companies and unduly burden competitors' products, and also result in a time-to-market advantage derived from knowledge about the changes to be imposed.

- Absence of an independent decision-maker – It appears that the licensing administrator will act as an agent for and under the control of the founding licensors, several of which are direct competitors of anticipated licensees. The absence of any safeguard against bias in favor of founding licensors is particularly problematic in light of: (a) the lack of clarity on the scope of the specifications and their potential for expansion over time to the disadvantage of licensees; and (b) the absence of an open standard-setting process for developing the specifications and associated rules prior to the formation of these license arrangements.

- Protection of competitively sensitive information – There appear to be several situations where licensees may be required to reveal to founders competitively sensitive proprietary information relating, for example, to product design plans or specifications. Some such disclosures may be warranted and indeed necessary to maintain the integrity of the licensed technology and for other legitimate purposes of these arrangements. However, the absence of "firewall" protections makes this requirement problematic. The license should contain explicit safeguards under which disclosures are made only to individuals unaffiliated with the founding licensors and under strictures preventing disclosure to their personnel.

- Individual negotiation opportunities and failure to disclose underlying intellectual property – There is no provision expressly allowing for individual negotiation of licenses with individual founders. HP's representatives approached the licensing agent for the technology about renegotiating certain terms but we were told that the license was non-negotiable. In essence, the license requires all licensees to accept a license for the entire bundle of unidentified intellectual property rights even though particular licensees may need only part of the bundle to

> develop and manufacture devices compliant with the specifications. Indeed, there can be no assurance that the licensors are not imposing an unnecessarily large bundle of rights upon all licensees since the licensors refuse to disclose the specific patents or other intellectual property they claim to be required for use of the specifications.

The Commission's evaluation of licensing terms is an important aspect of its review of technologies for approval under the broadcast flag regime. The technologies approved under this regulation should contain fair and reasonable license terms that promote competition and innovation. To this end, the Commission should ensure that the license terms for the DTCP and other broadcast flag technologies adequately protect the intellectual property investments of licensees and do not favor one technology over another.

Respectfully submitted,

HEWLETT-PACKARD COMPANY

/s/

David Isaacs
Director, Government & Public Policy
900 17th Street, N.W.
Suite 1100
Washington, D.C. 20006
(202) 884-7033

Henry Goldberg
Christopher G. Tygh
Goldberg, Godles, Wiener & Wright
1229 Nineteenth Street, N.W.
Washington, DC 20036
(202) 429-4900

Counsel to Hewlett-Packard Company

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